Supreme Court, U.S
FILED

031155 FEB 10 2004

OFFICE OF THE CLERK

In the

Supreme Court of the United States

AURELIO GRACIA; CARLOS LOPEZ-ELICIANO; PEDRO FIGUEROA; DAMARIS MANGUAL, individually and in their official capacity as members of the Commonwealth Elections Commission,

Petitioners,

v.

JOSE EMILIO PEREZ-GUZMAN, THE COMMONWEALTH OF PUERTO RICO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

Ramon L. Walker Merino
Counsel of Record
WALKER MERINO LAW OFFICE
P.O. Box 9023550
San Juan, Puerto Rico 00902-3550
(787) 565-4042
Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTION PRESENTED

Whether the Court of Appeals for the First Circuit (First Circuit and/or Court of Appeals hereinafter) went beyond the comity and federalism principles in upholding a ruling by the United States District Court for the District of Puerto Rico (Hon. Hector Laffitte) (district court hereinafter) which, in essence and practice, reversed a prior decision by the Supreme Court of Puerto Rico (P.R. Supreme Court hereinafter) in relation to a constitutional challenge to the Puerto Rico Electoral Law on First Amendment grounds.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner, the Puerto Rico State Elections Commission, is a government entity and, thus, has no parent company or nonwholly owned subsidiaries.

TABLE OF CONTENTS

pages

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 3

I. Review is Warranted because the Court of Appeals' decision encourages an undue intromission of federal courts in state electoral matters, a realm clearly for the states to handle, as stated by this Court 3

II. Review is also warranted because the Court of Appeals' decision seriously impinges on well-established comity and federalism principles, amply recognized in state electoral matters 7

III. Review is also warranted due to the role of the Notary-Lawyer in Puerto Rico and the operational realities of the electoral system 10

CONCLUSION 13

APPENDIX

CIRCUIT COURT DECISION 1a

DISTRICT COURT DECISION 39a

ORDER DENYING REHEARING 51a

16 L.P.R. § 3101(3) 53a

TABLE OF AUTHORITIES

pages

CASES

ALLEN V. MCCURRY, 449 U.S. 90, 96-105 (1980) 7

BUCKLEY V. ACLF, 582 U.S. 182 (1999) 5

BURDICK V. TAKUSHI, 504 U.S. ___, 119 L.ED.2D. 245 (1992) 5

DISTRICT OF COLUMBIA V. FELDMAN, 460 U.S. 462, 483 N.16 (1983) 8, 9, 12

HENRY V CONNOLLY, 910 F.2D 1000, 1002 (1ST CIR. 1990) 8

HILL V CONWAY, 193 F.3D 33, 34 (1ST CIR. 1999) 7, 8

IN RE LANDING & AULET, 7 P.R.OFFIC. TRANS. 109 (1978) 13

IN RE RAMOS, 86 P.R.R. 119 (1962) 13

IN RE: MIDDLESEX POWER EQUIP. & MARINE, INC., 292 F.3D 61, 66 N.1 (1ST. CIR. 2002) 7

KREMER V CHEMICAL CONSTR. CORP., 456 U.S. 461, 466 (1982) 7

MEYER V. GANT, 486 U.S. 414 (1988) 5

MIGRA V. WARREN CITY SCH. DIST. BD. OF EDUC., 465 U.S. 75, 80-85 (1984) 7

MUNRO V. SOCIALIST WORKERS PARTY, 479 U.S. 189 (1986) 5

PARTIDO ACCIÓN CIVIL V. E.L.A., 2000 J.T.S. 33 (2000) 2, 5

PARTIDO ACCIÓN CIVIL V. E.L.A., 2000 J.T.S. 73 (2000) 2

PENNZOIL CO. V. TEXACO INC., 481 U.S. 1, 23-25 (1987) 9

PICARD V MEMMBERS OF EMPLE. RET. BD., 275 F.3D 139, 145 (1ST CIR. 2001) 8

PSP, PPD, PIP V. ROMERO, 110 DPR 248, 281 (1980) 12

RODRIGUEZ V. POPULAR DEMOCRATIC PARTY, 457 U.S. 1, 8 (1982) 6

ROOKER V FIDELITY TRUST CO., 263 U.S. 412 (1923) 8

SHEENAN V. MARR, 207 F.3D 35, 39-40 (1ST CIR. 2000) 8

SIEGEL V. LE PORE, 234 F.3D 1163 (11TH CIR. 2000) 6

WANG V NEW HAMPSHIRE BOARD, 55 F.3D 698, 703 (1ST CIR. 1995) 8

WILSON V. SHUMWAY, 264 F.3D 120, 124 (1ST CIR. 2001) 8

Statutes

28 U.S.C. § 1291 3

28 U.S.C. § 1331 2

28 U.S.C. § 1738 7

42 U.S.C. § 1983 2

OPINIONS BELOW

The Opinion of the court of appeals (App., 1a-38a) is reported at 346 F.3d 229 (1st Cir. 2003). The opinion of the district court entering judgment for respondent (App., 39a-50a) is reported at 260 F.Supp.2d 389 (D.P.R. 2003).

JURISDICTION

The court of appeal's judgment was entered on October 9, 2003. A timely petition for rehearing was denied on November 12, 2003.

RELEVANT PROVISIONS

16 L.P.R.A. 3101(3). See Appendix.

STATEMENT

A.

This case raises important comity and federalism issues concerning the Puerto Rico Electoral Law, P.R. Supreme Court decisions on the matter, and this Court's prior pronouncements on the subject. Honorable Judge Laffitte of the District Court declared unconstitutional the requirement in the Puerto Rico Electoral Law, 16 L.P.R.A. 3101(3),[1] that petitions for new political parties be notarized by a lawyer, because it violates the First Amendment of the U.S.

---

[1] Article 3001(3) provides that petitions to form a new political party must be notarized in accordance with the local Notarial Act, 4 L.P.R.A. sec. 2002 et. seq.

Constitution. Judge Laffitte's decision, and the subsequent Opinion of the First Circuit, overthrow the decisions of the P.R. Supreme Court on this same constitutional challenge,[2] expressed in two prior **opinions** [3]

In the PAC case a majority of the P.R. Supreme Court had ruled exactly the opposite of what the district court and the First Circuit have ruled in this case. The P.R. Supreme Court held that the **challenged statute is constitutional**, and further ruled that the notarization requirement did not impose an unconstitutional undue burden on the First Amendment rights of the party and its members to organize politically and to circulate petitions. The P.R. Supreme Court had addressed the very same issue that the federal lower courts later confronted in this case. **There is certainly a clash between the two judicial systems.**

The district court had jurisdiction over this action pursuant to 42 U.S.C. 1983 and 28 U.S.C. 1331.

---

[2] In that instance the Partido Acción Civil, plaintiff in the PAC case, of which plaintiff here was a member at the time the case was litigated, and still is, is an organization that seeks to be registered as a political party and be in the 2004 electoral ballot in Puerto Rico.

[3] *Partido Acción Civil v. E.L.A.*, 2000 J.T.S. 33, 2000 PR Sup. LEXIS 18 (Opinion of February 25, 2000) (PAC I); and *Partido Acción Civil v. E.L.A.*, 2000 J.T.S. 73, 2000 PR Supp. LEXIS 59 (Opinion of April 25, 2000, on petition for reconsideration) (PAC II) (the PAC case hereinafter). Certified translations of the P.R. Supreme Court Opinions in the PAC case were filed with the First Circuit.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

I. Review is Warranted because the Court of Appeals' decision encourages an undue intromission of federal courts in state electoral matters, a realm clearly for the states to handle, as stated by this Court.

The circumstances presented by this case provide a clear opportunity for this Court to add further order and guidance to the relationship between federal and state courts in order to avoid power clashes, especially in electoral matters, which have been so evidently left by this Court to the realm of the states to handle.

The PAC case covered both Commonwealth and Federal constitutional claims. **The PAC party sought Certiorari to this Court, No. 00-124, which was denied. See 531 US 920, Oct. 2, 2000.**

The federal claim and arguments made there are identical to the ones presented here.[4] It was entertained on the merits and **rejected** by the P.R. Supreme Court; to wit:

1. The issue of "ad hoc notaries" was discarded in PAC I, supra, at pgs. 684-5.

---

[4] Even the legal counsel was the same, Mr. Rosario, Esq.

2. The well settled principle that not every instance related to the right to vote or association is fundamental was reiterated in PAC I, supra at pg. 687.

3. The argument as to "onerous requirements" was considered and denied in PAC I, supra, at pg. 688.

4. The need to use notaries to provide certainty to the electoral process was amply discussed, and reiterated, in PAC I, supra, at pg. 691.

5. The payment of $1 to the notaries and its legislative background was discussed and accepted in PAC I, supra, at pg. 692.

6. How the electoral system in Puerto Rico has been liberalized to make it easier for new political parties to be registered was discussed in PAC I, supra at pg. 692.

7. That political groups and independent candidates <u>are not similar</u> to established political parties is discussed in PAC I, supra, at pg. 693, nt. 5.

8. That there are no restrictions to freedom of speech by the challenged statute was decided in PAC II, supra, at pg. 1019.

9. Examples of political parties, state-wide and local, that have been registered using notarized petitions are given in PAC II, supra, pg. 1020.

10. As to the fact that Puerto Rico subsidizes political parties, and the history of frauds, which compel the need to have notaries and other safeguards in the electoral process to certify the veracity of the signed petition, see the discussion in PAC II, supra, at pg. 1021.

11. The cases of Meyer and Buckley,[5] cited "in extenso" by plaintiff here, and relied upon by the District Court, were considered, distinguished and held not applicable by the P.R. Supreme Court in PAC II, pgs. 1019-1020.

The district court and the First Circuit totally disregarded the well-versed reasons of the majority of the P.R. Supreme Court. For all practical purposes the lower federal courts reversed, *sub-silentio*, the P.R. Supreme Court.[6] With all due respect, lower federal courts are not empowered to do so. **For that reason alone, Certiorari should be granted.**

But there are further reasons in favor of granting certiorari and reversal. It is well established that the right of access to the ballot is not fundamental, *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Burdick v. Takushi*, 504 U.S. ___, 119 L.Ed.2d. 245 (1992); *Partido Acción Civil v. E.L.A.*, 2000 J.T.S. 33 at pg. 687, and cases cited therein. Thus, no strict

---

[5] *Meyer v. Gant*, 486 U.S. 414 (1988); *Buckley v. ACLF*, 582 U.S. 182 (1999).

[6] The First Circuit was aware of it when it stated...We are mindful that our constitucional conclusión differs from that of the Puerto Rico Supreme Court, and we do not lightly part company with so distinguished a tribunal". See App. 33a.

scrutiny is required to decide the equal protection claim. The District Court applied the strict scrutiny standard in light of a voter's First Amendment right to gather petitions to create a party to be in the ballot. In other words, the political party that did not prevail in its challenge to the statute will be ultimately benefited by a stretched-out first amendment right of one of its members. How far can the courts extend a First Amendment right of freedom of speech and association of an individual to the point that the real beneficiary is a political party that is trying to get access to the ballot? As stated previously, right of access to the ballot is not a fundamental right. It has become so by circumvention, resting solely on an individual's right, not a collective one.

The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to **substantial deference.** *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982). Absent some clear constitutional limitation, Puerto Rico is free to structure its political system to meet its 'special concerns and political circumstances'. Ibid., pg 13. It is also well established that **federal courts have a limited role in assessing a state's electoral process.** *Siegel v. Le Pore*, 234 F.3d 1163 (11th Cir. 2000). The District Court totally disregarded these basic principles, and the Court of Appeals went along.

II. Review is also warranted because the Court of Appeals' decision seriously impinges on well-established comity and federalism principles, amply recognized in state electoral matters.

This case presents complex and highly nuanced questions of comity, federalism and the proper use of federal judicial power.

By federal statute, "judicial proceedings of any court of any ... State, Territory or Possession ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State, Territory or Possession," 28 U.S.C. § 1738. This mandate "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). The fact that a suit raises a federal question or seeks to vindicate federal constitutional rights does not blunt the force of this command. See *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 80-85 (1984); *Allen v. McCurry*, 449 U.S. 90, 96-105 (1980). These principles were disregarded by the district court and the court of appeals.

In addition, the lower federal courts were foreclosed from entertaining the action under the Rooker-Feldman doctrine. Under said doctrine lower federal courts are without subject matter jurisdiction to sit in review of state court decisions. *In Re: Middlesex Power Equip. & Marine, Inc.*, 292 F.3d 61, 66 n.1 (1st. Cir. 2002); *Hill v Conway*, 193 F.3d 33, 34 (1st Cir. 1999);

Wang v New Hampshire Board, 55 F.3d 698, 703 (1st Cir. 1995); *Henry v Connolly*, 910 F.2d 1000, 1002 (1st Cir. 1990). Rooker-Feldman applies whether or not the federal and state causes of action are technically the same for purposes of claim preclusion, or whether all of the familiar conditions for issue preclusion are met. *Mandel v Town of Orleans*, No. 03-1123, slip op., 2003 U.S. App. LEXIS 7097, *9 (1st Cir. April 15, 2003). It is not necessary that the federal action formally seeks to invalidate the state judgment; it is enough if the federal action would in substance defeat or negate a state judgment; for example, if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Id (internal citations and quotations omitted).

Pursuant to this doctrine, lower federal courts are **precluded** from asserting jurisdiction over claims that are "inextricably intertwined" with the claims adjudicated in a state court. *District of Columbia v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v Fidelity Trust Co.*, 263 U.S. 412 (1923); *Picard v Memmbers of Emple. Ret. Bd.*, 275 F.3d 139, 145 (1st Cir. 2001); *Wilson v. Shumway*, 264 F.3d 120, 124 (1st Cir. 2001); *Sheenan v. Marr*, 207 F.3d 35, 39-40 (1st Cir. 2000) (footnote omitted). Citing an Eighth Circuit Opinion, the First Circuit refined the "inextricably intertwined" requirement in *Hill*, 193 F.3d at 39, as follows:

> Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its holding. Deciding whether Rooker-Feldman bars

> the plaintiffs' federal suit therefore requires that we determine what the state court held and whether the relief that the plaintiffs requested in their federal action would void the state court's decision or would require us to determine that the decision was wrong.

As noted by Justice Marshall in his Concurring Opinion in *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 23-25 (1987):

> As we have said, "if the constitutional claims presented to a United States district court are "inextricably intertwined" with the merits of a judgment rendered in state court, "then the district court is in essence being called upon to review the state-court decision. This the district court may not do."

District of Columbia Court of Appeals v. Feldman, 460 U.S. at 483-484, n.16. While the question whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

In our case it is not difficult to ascertain that Plaintiff's intention is to have the PAC case judgment overturned, and he succeeded in the lower federal courts. But said courts cannot entertain the action under the Rooker-Feldman doctrine.

III. Review is also warranted due to the role of the Notary-Lawyer in Puerto Rico and the operational realities of the electoral system.

This case presents also an important scenario of serious consequences. The lower federal courts' decisions have an operational impact in the way the electoral process is to be conducted, and precariously relax the integrity of the process by which a political party can be registered and participate in the Puerto Rico electoral system. Because of the importance in protecting the integrity of that process, only officials with a high degree of credibility and trustworthiness should be allowed to verify the signatures of those electors that support the registration of a new party. Those officials, the lawyers-notaries, face disciplinary, penal and professional sanctions in case they fail to faithfully carry out their duties. This is not equally applicable, nor required, to persons that individually collect endorsements and personally notarize them with an "ad hoc" appointment.

This Court ought to be aware that in Puerto Rico political parties are financed with public funds, which under the present electoral system represents close to **forty million dollars ($40,000,000) per registered political party, each four years.** There are presently three registered political parties. Any new registered party entails additional expenses. **Our**

research has not revealed any other State that subsidizes political parties like Puerto Rico does. Consequently, in exchange for such subsidies, Puerto Rico is entitled to require stricter standards than those that may exist in the other fifty States for the registration of political parties. The district court and the court of appeals failed to consider this dramatic reality.

From the operational point of view, as the Puerto Rico State Elections Commission is structured, each new party represents an additional Electoral Commissioner. Each Commissioner requires employees and assistants, is entitled to one representative in each of the 102 Permanent Inscription Units located throughout the Island, corresponding desks, chairs and other work tools, additional rent space, eight supervisors, among other personnel items and expenses. **All that apparatus is paid with public funds, not by the political parties.**

The above illustrates the importance and need that the process by which a new political party is to be registered in Puerto Rico be carefully scrutinized by mechanisms that provide confidence to the process. The formality of said process is an indispensable element to avoid laxity in the manner by which new political parties make their entry in the Puerto Rico political scenario and electoral system. It may very well develop into an attractive and lucrative business for groups of individuals with political agendas but insignificant electoral support. The decision by the District Court, approved by the First Circuit, is the first launch in that path.

The Puerto Rico Constitution prohibits that the purity of the electoral process be seriously affected for lack of the necessary guarantees.[7] Precisely for protection of that purity Certiorary should be issued.

Another matter to be reckoned with is the figure of the notary public in Puerto Rico, which is a legal figure of civil law connotations, widely different from the notary public figure in common law jurisdictions. As to the importance of the role of the notary public in Puerto Rico, petitioner respectfully refers the Court to the discussion by the P.R. Supreme Court in the CAP I Opinion. A certified official translation was submitted on July 24, 2003, supra at 14-16.

At the very least, lawyer-notaries are strictly regulated and closely supervised by the P.R. Supreme Court. Sanctions on lawyer-notaries who do not strictly comply with their obligations range from disbarment to penal sanctions. As noted by the P.R. Supreme Court in PAC I, supra at 7,

> "unlike the requirement that registration petitions for primary candidacies be sworn before ad hoc notaries, the legislative requirement that registration petitions for a party by petition be sworn to before a notary public answers the need for establishing a registration mechanism that would enjoy the presumption of notarial authentication to guarantee the integrity of the electoral process".

---

[7] *PSP, PPD, PIP v. Romero*, 110 DPR 248, 281 (1980) (dissenting opinion J.Trias Monge). Translation ours.

The danger of fraud is no mere possibility. As noted by the P.R. Supreme Court in PAC I, Puerto Rico already has experienced substantial fraud in the 1960's in the registration of at least one group as a political party. As a response to such fraudulent practices lawyers were disbarred. See, *In re Landing & Aulet*, 7 P.R.Offic. Trans. 109 (1978), and *In re Ramos*, 86 P.R.R. 119 (1962).

CONCLUSION

The lower federal courts have unnecessarily tampered with a local electoral matter that has been traditionally left to the states to manage. In this case Puerto Rico has structured a system by which new political parties can be registered and reach the ballot. That system requires that a lawyer-notary certifies the veracity of the person who signs the endorsement to have the party registered. Such framework has been discarded by lower federal courts, regretfully after the P.R. Supreme Court had held that it was constitutionally permissible. Thus, the lower federal court decisions are contrary to all well-established principles of comity and federalism, most particularly protected in electoral matters.

For any and or all of the reasons stated above, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

RAMÓN L. WALKER MERINO
Counsel Of Record
WALKER MERINO LAW OFFICE
P.O. BOX 9023550
SAN JUAN, PUERTO RICO 00902-3550
TEL. (787) 565-4042 / 529-9923
FAX. (787) 724-1069

(Any footnotes trail the end of each document)

Nos. 03-1621, 03-1622

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOSE EMILIO PEREZ-GUZMAN,
Plaintiff, Appellee,

v.

AURELIO GRACIA, ETC., ET AL.,
Defendants, Appellants.

COMMONWEALTH OF PUERTO RICO,
Intervenor, Appellant.

October 9, 2003, Decided

COUNSEL: Gerardo de Jesus Annoni, with whom Sanchez-Betances & Sifre, P.S.C., and Ramon Walker Merino were on consolidated brief, for appellants.

Nelson Rosario Rodriguez for appellee.

JUDGES: Before Selya, Circuit Judge, Stapleton, * Senior Circuit Judge, and Howard, Circuit Judge.

OPINIONBY: SELYA

OPINION: SELYA, Circuit Judge. In Puerto Rico, organizations that seek to be recognized as political parties must gather roughly 100,000 endorsing petitions, each signed by a registered voter and sworn

to before a notary public. Since only a lawyer can become a notary in Puerto Rico, there are fewer than 8,000 notaries in the entire commonwealth -- and notarial services do not come cheap. Chafing under these restrictions, a nascent political party -- the Partido Accion Civil (the Party) -- challenged various aspects of the law, including the lawyer-notarization requirement, in the local courts. The Party lost.

Plaintiff-appellee Jose Emilio Perez-Guzman (Perez), a member of the Party who had not participated in the earlier suit, remained dissatisfied with the lawyer-notarization requirement. He sued the members of the Puerto Rico State Elections Commission (the Commission) in the federal district court. The district court rejected a proffered res judicata defense and found that the lawyer-notarization requirement violated the plaintiff's First Amendment rights. Perez Guzman v. Gracia, 260 F. Supp. 2d 389 (D.P.R. 2003). The Commission and the Commonwealth (which had intervened in the proceedings below) appeal from this ruling.

The questions raised by these appeals are novel and important. The res judicata issue involves the extent to which a judgment against an association can preclude a later action by a member of that association. The constitutional issue pits the government's interest in regulating elections against an individual's interests in electoral participation and freedom of association. Having worked our way through both issues, we conclude, as did the district court, that the instant action is not pretermitted by the prior judgment and that the lawyer-notarization requirement unduly

burdens First Amendment rights. Consequently, we affirm the judgment below.

I. BACKGROUND

The Party is an unincorporated association seeking to be registered by petition as a political party, and Perez is among its members. Under commonwealth law, a "Party by Petition" -- Shall be any group of citizens who, desiring to appear on the electoral ballot of a general election, shall register as a political party, on or before June 1 of the election year, by filing with the Commission sworn petitions to such effect, before notary publics duly admitted to the practice of notary, pursuant to the provisions of the Notary Act in effect, who shall collect from the Electoral Commission a fee of one (1) dollar for each valid, notarized petition signed by a number of electors of no less than five (5) percent of the total votes cast for all candidates for the office of Governor in the preceding general election. P.R. Laws Ann. tit. 16, § 3101(3) (2000). Because more than 2,000,000 votes were cast in the 2000 gubernatorial election, a group that currently desires to register a political party must amass in excess of 100,000 notarized petitions. Each petition must be signed and sworn to before a notary public and filed with the Commission within seven days after notarization. Id. § 3102.

There is nothing wrong with a state demanding that a would-be political party demonstrate a "significant modicum of support" before gaining access to the ballot, n1 Jenness v. Fortson, 403 U.S. 431, 442, 29 L. Ed. 2d 554, 91 S. Ct. 1970 (1971), and, thus, petitioning requirements are commonplace in such situations. But

Puerto Rico's obviously burdensome rule -- a rule that requires each signature to be separately notarized -- is quite uncommon. See, e.g., Am. Party of Tex. v. White, 415 U.S. 767, 775 n.6, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974) (noting that, under Texas law, a single notarial certificate "may be so made as to apply to all [signatories] to whom [the oath] was administered"); Ga. Code Ann. § 21-2-170(d) (Supp. 2002) (providing that each sheet of a nominating petition must bear the circulator's affidavit pertaining to the voter signatures reflected thereon). Puerto Rico's rule that only attorneys can serve as notaries, P.R. Laws Ann. tit. 4, § 2011 (2000), is also rare. The combination of the two rules is, insofar as we can tell, unique.

Given this peculiar collocation of circumstances, it is not surprising that controversy has surrounded Puerto Rico's notarization requirement. We reviewed the procedural history of the Party's challenge to it in an earlier opinion, see Cruz v. Melecio, 204 F.3d 14, 17-18 (1st Cir. 2000), and we briefly rehearse that history in order to put the appellants' res judicata defense into perspective.

On October 6, 1998, the Party filed an action in the Puerto Rico Court of First Instance against the Commission and others. Its complaint averred, inter alia, that the lawyer- notarization requirement transgressed the Constitution. The court granted summary judgment in favor of the defendants; the Puerto Rico Circuit Court of Appeals upheld the judgment; the Puerto Rico Supreme Court also affirmed, see Civil Accion Party v. Commonwealth, 2000 TSPR 29, 2000 WL 223543 (P.R. Feb. 25, 2000) (CAP I), reconsideration denied per curiam, 2000 TSPR

61, 2000 WL 462276 (P.R. Apr. 25, 2000) (CAP II); and the United States Supreme Court denied certiorari, 531 U.S. 920 (2000).

Just two days before the intermediate appellate court ruled, fourteen Party members filed an action for declaratory and injunctive relief in Puerto Rico's federal district court. The action raised essentially the same federal constitutional claims, including the claim that the lawyer-notarization requirement violated the plaintiffs' rights to free speech and association, to participate in the political process, to vote, and to enjoy equal protection of the laws. Cruz, 204 F.3d at 17. The district court dismissed the action on the merits.

An appeal ensued. In it, we first addressed the potential applicability of res judicata. We held that the defense did not apply because the commonwealth court proceedings were, at that point, still in progress. Id. at 20-21. We then determined that the district court had erred in dismissing the action for failure to state a potentially viable claim. Id. at 22. The complaint had alleged facts which, if true, "tended to support the appellants' claims that the notarization requirement and seven- day [filing] deadline unduly burden ballot access." Id. Thus:

If . . . the appellants can prove that notarization is prohibitively expensive or otherwise difficult to achieve (as the complaint avers), then the Commission will have to show that the notarization requirement is narrowly drawn to advance a compelling governmental interest. This showing requires the Commission to come forward with proof. Whether it ultimately can succeed in this endeavor is a sufficiently open question that we cannot

conclude, on the pleadings, that no set of facts exists under which the appellants might prevail. Id. (footnote and internal citation omitted). Accordingly, we vacated the order of dismissal.

Still, we did not allow the case to proceed unabated, but, rather, instructed the district court to stay further proceedings pending the Puerto Rico Supreme Court's decision. Id. at 25. Among the factors we found "highly relevant to the calculus of abstention" was our belief that "the appellants [had] filed the present suit in an effort to detour around an unfavorable judgment of the commonwealth trial court." Id. at 24. After the Puerto Rico Supreme Court affirmed the judgment against the Party and the United States Supreme Court denied certiorari, the district court dismissed Cruz on res judicata grounds. The Cruz plaintiffs did not appeal, and that appeared to be the end of the matter.

Appearances can be deceiving. The next year, Perez filed this action challenging the lawyer-notarization requirement (but not the seven-day filing requirement). In relevant part, the complaint sought a declaration that the lawyer-notarization requirement, P.R. Laws Ann. tit. 16, § 3101(3), violated Perez's rights to freedom of speech and equal protection. It also prayed for an injunction prohibiting the defendants from enforcing section 3101(3) and the corresponding regulations.

After an evidentiary hearing, the district court entered an order "declaring the requirement . . . that petitions for new political parties be notarized by a lawyer to be in violation of the First Amendment of the Constitution." Perez Guzman, 260 F. Supp. 2d at 394.

The court's determination rested in large part on the idiosyncratic nature of Puerto Rico's lawyer-notarization requirement. In that regard, the court made three critical findings. First, it found as a fact that the cost of notarizing 100,000 petitions would be at least $ 1,500,000. Given this substantial outlay, the lawyer-notarization requirement imposed a severe financial burden upon a citizen's "right to associate and to form political organizations which advance common goals and ideals." Id. at 392 (footnote omitted). Second, the court found that the appellants had failed to show that the lawyer-notarization requirement was narrowly tailored to advance a compelling governmental interest. Id. at 393. In making this point, the court emphasized that in other electoral contexts the Commission had authorized ordinary voters to verify signatures despite the fact that they were not notaries, but had refused to sanction any comparable arrangement for witnessing party-registration petitions. Id. at 391, 393. There was no evidence that lawyer-notaries perform this attestation function better than authorized ad hoc notaries. Id. at 393. Finally, the court found that other existing safeguards, such as the Commission's practice of independently verifying each petition submitted to it, adequately protect Puerto Rico's legitimate interest in the integrity of its electoral processes. Id. at 390, 393.

In a separate (unpublished) order, the court rejected the asserted res judicata defense. The court found no privity between Perez and the Party because the record did not show that Perez had in any way participated in or controlled the Party's case. Indeed, the court found "no evidence" that Perez was even a Party member during the currency of the earlier litigation.

Following the entry of a judgment declaring section 3101(3) unconstitutional, these timely appeals eventuated. In an abundance of caution, we stayed the execution of the judgment and expedited appellate review. We now confront the substance of the appeals. Because the res judicata defense, if successful, would end our inquiry, we start there.

II. RES JUDICATA

The applicability of the doctrine of res judicata presents a question of law over which we exercise plenary review. See Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 755 (1st Cir. 1994). Inasmuch as we are called upon here to determine the preclusive effect of a judgment entered by the commonwealth courts, Puerto Rico law supplies the rule of decision. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982); Cruz, 204 F.3d at 18-19.

In Puerto Rico, the doctrine of res judicata is embedded in the Civil Code:

> In order that the presumption of the res adjudicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such. P.R. Laws Ann. tit. 31, § 3343 (1990). The issue here involves the identity of the parties in the two actions. We know that the requirement of "perfect identity" cannot be taken literally; mere nominal differences will not undermine the preclusive effect of an earlier judgment. Cruz, 204 F.3d at 19. Hence, parties who are in privity with each

other are considered identical for res judicata purposes. Banco Cent., 27 F.3d at 756-57.

In Cruz, we determined that privity existed between the plaintiffs and the Party (the plaintiff in the original commonwealth court action), stating:

Although the present appellants are not named parties in the commonwealth court proceedings, they are members of the organization that is the plaintiff there and they control that litigation. This type of privity suffices for res judicata purposes. 204 F.3d at 19. This determination depended on a combination of two factors: the plaintiffs were members of the Party and they controlled its conduct of the litigation. In turn, the finding of control derived from the Cruz plaintiffs' admissions. They made no bones about the fact that they were the prime movers behind the Party's case, "vigorously asserting that they were denied a full and fair opportunity to litigate their federal claims in the commonwealth proceedings." Id. (emphasis supplied). Because the Cruz plaintiffs claimed ownership of the Party's case, we held them to the natural consequences of that claim.

Before us, the appellants engage in a largely didactic exercise, asserting that Cruz stands for the proposition that any member of a political party has control over litigation brought by that party (and, therefore, that the party is in privity with every one of its members). But this assertion rests on a porous foundation -- the notion that Cruz means something other than what it says. We reject that notion. Cruz required proof of control as a building block in the showing of privity, and

without such proof there would have been no privity in the circumstances of that case.

This action is at a considerable remove. Unlike the Cruz plaintiffs, Perez steadfastly disclaims any exercise of control over the original case. In the absence of an admission, the appellants, as the proponents of the res judicata defense, have the burden of establishing a factual basis for that defense. Banco Cent., 27 F.3d at 759. But they have not adduced any evidence sufficient to carry their burden (indeed, they have made no discernible effort to do so). They have shown only that Perez's attorney also represented the Party -- and that is not a sufficient predicate for an inference of control. See id. (noting that courts regularly "have refused to find substantial control merely because a nonparty retained the attorney who represented a party to the earlier action"). The district court's finding that Perez did not control the prior litigation is, therefore, inexpugnable.

The appellants' first fallback argument is that, even absent control, Perez's membership in the Party, his commonality of interests with the Party and its other members, and his desire to register the Party combine to establish privity as a matter of law. The Party, so this argument goes, is in privity with every one of its members because it sued to advance their associational rights. To a person, the members stood to gain if the Party had prevailed; thus, all of them should be bound by the Party's loss.

This argument is misguided. Concepts of privity do not grow more expansive when a political party or its members raise First Amendment claims. After all, the

fact that First Amendment rights are at stake ought to weigh against, not for, a finding of preclusion. Cf. Richards v. Jefferson County, 517 U.S. 793, 797, 135 L. Ed. 2d 76, 116 S. Ct. 1761 (1996) (noting that "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character'") (quoting Postal Teleg. Cable Co. v. Newport, 247 U.S. 464, 476, 62 L. Ed. 1215, 38 S. Ct. 566 (1918)); Williams v. Rhodes, 393 U.S. 23, 30-31, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968) (acknowledging that First Amendment rights "rank among our most precious freedoms").

At any rate, the question of whether an individual should be bound by an association's actions in a prior suit is distinct from whether, in practice, the right at issue has an associational component. As we explained in Cruz, "individuals have constitutionally protected interests in free association and electoral participation, including the formation of new political parties." 204 F.3d at 22 (emphasis supplied). Joining a political party is an exercise of associational rights, but forging such a link does not automatically consign the defense of those rights to the party. Although political parties may "derive rights from their members," FEC v. Colo. Repub. Fed. Campaign Comm., 533 U.S. 431, 448 n.10, 150 L. Ed. 2d 461, 121 S. Ct. 2351 (2001), the members' own rights are not automatically subsumed in a judgment against the party. n2

This might have been a closer case if the appellants had proven that the Party, in the manner, say, of certain labor unions or trade associations, served generally as the duly constituted representative of its members in litigation affecting common interests. See, e.g., Gen.

Foods Corp. v. Mass. Dep't of Pub. Health, 648 F.2d 784, 787-88 (1st Cir. 1981); see generally 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4456, at 502 (2002) (citing cases). But the record here is bereft of anything showing that either political parties in general or this Party in particular are invested with authority to represent members. In the absence of any evidence anent the Party's charter, bylaws, or membership terms, there is simply no basis for a finding that Perez ever authorized the Party, expressly or by fair implication, to sue on his behalf. n3

This lack of authorization is especially significant because the Party is a jural entity entitled to sue in its own right. Unlike the trade association in General Foods, 648 F.2d at 787, its standing to challenge the lawyer-notarization requirement did not "depend[] on [any] claim to represent its members as the real parties in interest." And unlike the trade association in Expert Electric, Inc. v. Levine, 554 F.2d 1227, 1229 (2d Cir. 1977), the Party was not "established to jointly represent its [members]" in all phases of a particular activity. Without such indicia, mere membership cannot allow the Party's actions to bind Perez. See Restatement (Second) of Judgments § 61(2) (1982) (noting that if an unincorporated association is a jural entity distinct from its members, a judgment against the association binds its members only to the same extent as a judgment against a corporation binds its shareholders); id. § 59 (explaining that, with exceptions not relevant here, a judgment in an action in which a corporation is a party does not bind corporate shareholders).

From what we have said, it should be evident that the commonality of First Amendment interests between a political party and its members is not itself enough to support a finding of privity. See Griffin v. Burns, 570 F.2d 1065, 1071 (1st Cir. 1978) (explaining, in a case involving First Amendment rights, that "mere similarity of interest and a quantum of representation in the earlier suit do[] not suffice to bar a non-party"). Without evidence of either control or authorization, the appellants' proposition is untenable.

The appellants next argue for a determination of privity based on the doctrine of virtual representation -- a term that is used as a synonym for "de facto representation" based on an identity of interests between a party to the earlier suit and a nonparty, Banco Cent., 27 F.3d at 758 n.5. That possibility need not occupy us for long. The appellants did not rely on this doctrine below and, accordingly, they have forfeited the right to raise it in this venue. See, e.g., Teamsters Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992) ("If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal."); Clauson v. Smith, 823 F.2d 660, 666 (1st Cir. 1987) (holding that new legal theories "cannot be surfaced for the first time on appeal").

Even absent this procedural default, the argument would be unavailing. The record here is barren of any evidence that would support a finding of virtual representation. In particular, there is no proof that either Perez or the Party, in the institution of this action, were engaged in "tactical maneuvering designed

unfairly to exploit technical nonparty status in order to obtain multiple bites of the litigatory apple." Banco Cent., 27 F.3d at 761. Given this dearth of evidence, we cannot find that the Party represented Perez, virtually or otherwise, in maintaining the earlier action.

The authorities relied upon by the appellants in support of their various res judicata theories are inapposite here. We briefly discuss the two principal decisions. n4

In Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 322 F.3d 1064 (9th Cir. 2003), the plaintiff association was formed for the avowed purpose of actively representing the interests of its individual members before various regulatory agencies and had the authority to bring claims on behalf of its members. Id. at 1083. On that basis, the court concluded, with liberal use of adverbs, that "the Association represented the interests of its member property owners sufficiently thoroughly to bind other members alleging similar wrongs arising from the same set of facts." Id. (footnote omitted). The factors that the Tahoe court found significant, such as association for the express purpose of litigation and authorization of representation, are totally absent here.

So too Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996), in which the aldermen-plaintiffs filed a second action while the first was pending, "simply adding new plaintiffs." Id. at 457. The court found unmistakable evidence of "tactical maneuvering" such that not applying preclusion would have "allowed various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group." Id. As we have

observed, however, there is no evidence that Perez is part of a coordinated strategy to circumvent a prior judgment. The appellants simply have not proven collusion.

With the facts and the law arrayed against them, the appellants shift their emphasis to policy grounds. They contend that a rule of blanket preclusion is necessary to promote finality and forestall manipulative practices, including claim-splitting, forum-shopping, and serial litigation. But we are skeptical of the value of a mechanical rule, and there is no sign that any manipulation occurred in this case. The appellants have not shown that Perez is a puppet dancing on a string pulled by the Party or that the Party has orchestrated a strategy of serial attacks on the lawyer-notarization requirement. In lieu of proof, the appellants apparently would have us infer guilt by association. We will not do so.

Relatedly, the appellants predict disaster if blanket preclusion is rejected. They insinuate that members of a political party would have no incentive to join a pending action, for they would benefit if the party won but would be free to litigate the point if the party lost. Endless litigation would be the norm.

This prediction is much too gloomy. For one thing, it overlooks the salutary effect of the doctrine of stare decisis on repetitive litigation. Perhaps more important, it overlooks the principle that "the law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." Chase Nat'l Bank v. Norwalk, 291 U.S. 431, 441, 78 L. Ed. 894, 54 S. Ct. 475

(1934); accord Martin v. Wilks, 490 U.S. 755, 763, 104 L. Ed. 2d 835, 109 S. Ct. 2180 (1989) (reaffirming that "a party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined"). Finally, the appellants' prediction proves too much: many others also stood to benefit from the Party's litigation (for example, other aspiring political parties and their members) -- yet no one is sanguine enough to suggest that they too should be bound by its defeat. So long as we retain our historic tradition that each person is entitled to his own day in court, we cannot extend preclusion to nonparties merely because they have failed to seize an opportunity to intervene in a prior action.

That ends this aspect of the matter. As we have said, Puerto Rico law supplies the rule of decision as to the efficacy of the res judicata defense in this case. The appellants have not persuaded us that the Puerto Rico courts would find privity in these circumstances. See, e.g., Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 975 (1st Cir. 1989) (holding, under Puerto Rico law, that a corporation was not in privity with the plaintiff class in a prior action challenging the same business regulation merely because the two sets of plaintiffs enjoyed a "community of interest"); Pol Sella v. Lugo Christian, 7 P.R. Offic. Trans. 593, 107 P.R. Dec. 540, 549 (1978) (explaining that res judicata applies when the same person is the real party in interest vis-a-vis both suits); Heirs of Zayas Berrios v. Berrios, 90 P.R.R. 537, 552, 90 P.R. Dec. 551 (1964) (finding identity of parties where defendants in second case "actually controlled" the first case); cf. A & P Gen. Contractors, Inc. v. Asociacion Cana, Inc., 10 P.R. Offic. Trans. 984, 110 P.R. Dec. 753, 10 P.R. Off. Trans. 987, 994-95 (1981)

(reiterating that Puerto Rico has not "abandoned the rule of . . . identity" with respect to res judicata). In the absence of privity, it necessarily follows that the district court did not err in refusing to honor the res judicata defense. n5

III. THE MERITS

This brings us to the heart of the matter: the interaction between the lawyer-notarization requirement and the First Amendment. We review de novo the trial court's elucidation of First Amendment standards and its application of those standards to the discerned facts. Globe Newsp. Co. v. Beacon Hill Arch'l Comm'n, 100 F.3d 175, 181 (1st Cir. 1996); Kassel v. Gannett Co., 875 F.2d 935, 937 (1st Cir. 1989). This protocol is not a procedural device, but, rather, "a rule of federal constitutional law" reflecting "a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510-11, 80 L. Ed. 2d 502, 104 S. Ct. 1949 (1984).

Like any other citizen, Perez has "constitutionally protected interests in free association and electoral participation, including the formation of new political parties." Cruz, 204 F.3d at 22 (collecting cases). Although these interests are important, they are not absolute. Fair, honest, and orderly elections do not just happen. Substantial state regulation is a prophylactic that keeps the democratic process from disintegrating into chaos. Consequently, there is a strong state interest in regulating all phases of the electoral process, including ballot access. Storer v. Brown, 415 U.S. 724,

730, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974); Libertarian Party of Me. v. Diamond, 992 F.2d 365, 370 (1st Cir. 1993).

We do not mean to minimize the schizophrenic nature of election campaigns, which are as much a means of disseminating ideas as a means of attaining political objectives. See Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186, 59 L. Ed. 2d 230, 99 S. Ct. 983 (1979). Given this duality, an overly stringent regulatory scheme may place an intolerably heavy burden on freedom of political expression. See id. In the last analysis, a fine line separates permissible regulation of state election processes from impermissible abridgement of First Amendment rights.

Plotting that line calls for a careful reconciliation of competing centrifugal and centripetal forces. The rigorousness of the ensuing judicial inquiry depends upon the extent to which the challenged regulation burdens First Amendment rights. Burdick v. Takushi, 504 U.S. 428, 434, 119 L. Ed. 2d 245, 112 S. Ct. 2059 (1992); Werme v. Merrill, 84 F.3d 479, 483 (1st Cir. 1996). Following this prescription, we afford exacting scrutiny to severe restrictions on ballot access. Cruz, 204 F.3d at 22. That entails viewing such restrictions skeptically and requiring that they be drawn narrowly to advance compelling state interests. Norman v. Reed, 502 U.S. 279, 289, 116 L. Ed. 2d 711, 112 S. Ct. 698 (1992). To this end, we start with an assessment of the severity of the restriction. We then proceed to identify the interests that the appellants believe justify its imposition, weigh the efficacy of the available alternatives, and decide where the lawyer- notarization requirement falls along the constitutional line. Timmons

v. Twin Cities Area New Party, 520 U.S. 351, 358, 137 L. Ed. 2d 589, 117 S. Ct. 1364 (1997).

We approach the question of severity by looking first at its theoretical underpinnings. Traditionally, the act of circulating a petition has been viewed as "a one-on-one communication." Buckley v. Am. Const. Law Found., 525 U.S. 182, 199, 142 L. Ed. 2d 599, 119 S. Ct. 636 (1999). n6 One person circulates the petition, obtains the voter's signature, and verifies the origins of the signature. See, e.g., Frami v. Ponto, 255 F. Supp. 2d 962, 965 (W.D. Wis. 2003). In Puerto Rico, however, each of the 100,000 petitions must be signed singly and sworn in the presence of a lawyer-notary. This requirement triangulates the normal channels of communication. Assuming that the circulator is not himself a notary, there must now be one person to initiate the conversation, a second to respond, and a third to verify that response.

This triangulation limits the efficacy of petition circulators in their own right. No matter how persuasive a circulator might be in a face-to-face conversation, he cannot seal the deal then and there. The final exchange in the interactive communication -- the voter's official endorsement of the fledgling party -- cannot occur unless and until a notary is present. The historic role of the circulator is necessarily diminished.

In this case, Perez plainly labored under this heavy yoke. He testified without contradiction that the lawyer- notarization requirement greatly hampered his efforts to gather signatures because, in addition to convincing voters that a new political party was needed, he also had to convince them to repair to an

attorney's office. When he tried to recruit others to help in the circulation of petitions, those whom he could interest were "just common people," not notaries. The district court credited this testimony.

The stringency of the restriction is aggravated because the indispensable third person in the triangulated relationship -- the notary -- may prove hard to find. In most jurisdictions, it is neither impractical nor burdensome for party members to become notaries so that they may verify the petitions that they circulate. See Am. Party of Tex., 415 U.S. at 787. But Puerto Rico's restriction of notarial status to licensed attorneys erects a high barrier to entry and virtually ensures that the supply of notaries will remain inelastic notwithstanding voters' attempts to mount new-party registration drives.

Nor is this a purely theoretical difficulty. The district court found that Puerto Rico has only 8,000 lawyer-notaries, more or less. See Perez Guzman, 260 F. Supp. 2d at 391. Hence, the ratio of notaries to voters is quite small, and common sense suggests that there may be areas of the island where lawyers (and, thus, notaries) are in short supply. Even in areas where notaries are plentiful, someone must travel; either the voter must visit the notary's office or the notary must take to the field.

Last -- but far from least -- someone must pay the freight. n7 The district court determined that the average cost for notarizing a simple document signed at a lawyer's office is between $ 15-$ 20; the cost if the lawyer travels to the site of the signing escalates to $50- $60; those who would form a party by petition need

to collect a minimum of 100,000 signatures; and, accordingly, the lawyer-notarization requirement adds at least $ 1,500,000 to the cost of a successful petition drive. Id. at 391-92. The court further found that this was "an unreasonably high price tag for an individual who is seeking to exercise his constitutional rights." Id. at 392 (footnote omitted).

These findings are wholly supportable. n8 Indeed, the court's cost estimates may be conservative because, as a practical matter, a group attempting to form a party by petition will need to gather a surplus of signatures (as challenges likely will result in a number of invalidations). The court's findings make manifest that the task of registering a new political party is one of daunting proportions. We hold, therefore, that the lawyer- notarization requirement imposes a severe restriction on Perez's ability to register a new political party, and, in turn, on his right to access the ballot.

The appellants' only direct rejoinder is to remind us that the Puerto Rican Renewal Party (PRRP) managed to register for the 1984 election as a party by petition. But no other party has duplicated that feat in the quarter-century since section 3101(3) was enacted, see CAP I, Off. Trans. at 9, so this is hardly an indication that the lawyer-notarization requirement is a piece of cake. Cf. Storer, 415 U.S. at 742 (noting evidentiary significance of a showing that particular types of aspirants have "qualified [for the general ballot] with some regularity"). The PRRP example demonstrates, at most, that the lawyer-notarization requirement is not insuperable -- not that the requirement is less than severe. It follows that such a showing does not foreclose Perez's suit. See, e.g., Anderson v. Celebrezze, 460 U.S.

780, 791 n.12, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983) (explaining that the ability of a few individuals to qualify as independent presidential candidates "did not negate the burden imposed" by the challenged regulation); cf. Am. Party of Tex., 415 U.S. at 783 (explaining that what is demanded as a condition to ballot access "may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot") (emphasis supplied).

Apart from this glancing reference to the PRRP's success, the appellants do not seriously dispute the severe impact of the lawyer-notarization requirement. Instead, they attempt to confess and avoid. Their effort tracks three main avenues.

First, the appellants propose that a reviewing court should afford Puerto Rico wide latitude vis-a-vis the challenged regulation because the Supreme Court, in American Party of Texas and Jenness, upheld other notarization and petitioning requirements as reasonable. This proposition overlooks the fact that both cases were decided before the Supreme Court crystallized its current standard of inquiry in cases such as Burdick, 504 U.S. at 434. More important, it overlooks the salient differences that distinguish those two cases from the case at bar. We explain briefly.

Although the Court sanctioned a notarization requirement in American Party of Texas, it gave no indication that Texas limited notarial status to members of the bar. Moreover, the relevant numerical threshold was one percent of the active electorate -- not five percent -- and bulk notarization seems to have been

available. 415 U.S. at 775 n.6. The Georgia law at issue in Jenness required signatures from five percent of the active electorate but imposed no concomitant notarization requirement with respect to individual voters' signatures. 403 U.S. at 439.

These differences make it clear that the appellants are comparing plums to pomegranates: whereas American Party of Texas dealt with a claim that a garden-variety notarization requirement constituted a severe restriction and Jenness dealt with a claim that a petitioning requirement constituted a severe restriction, the case before us turns on the synergy among three discrete factors: the five percent numerical requirement; the requirement that each signature be individually notarized; and the restriction of notarial practice in Puerto Rico to lawyers. It is this synergy that places section 3101(3) beyond the pale, for it transforms the dynamics of participation in the electoral process.

The appellants' second avenue for marginalizing the severity of the imposed restriction involves drawing a distinction between the act of seeking support from the voter (which anyone can do at any time and place) and the act of authenticating the voter's signature. The appellants argue that the lawyer-notarization requirement comes into play only after the voter has agreed to subscribe a petition and, thus, does not have First Amendment implications. The requirement merely "regulates the mechanics of the electoral process," not "the communicative aspect of petitioning." CAP II, Off. Trans. at 7.

This distinction is artificial. Petition circulators -- persons like Perez -- are free only in theory "to convey their political message through whatever means they may deem convenient." Id. The notarization requirement's looming presence forces the circulator to structure his communications and choose his target audiences with that requirement in mind. Perez, like most persons, is not a notary. In principle, he is free to go from door to door soliciting support for the Party, but in practice his rate of return will suffer because he cannot gather endorsing signatures on the spot. The record makes clear not only that some voters who would be willing to sign petitions are not willing to venture to a law office but also that Perez faces enormous difficulties in persuading notaries to accompany him in search of prospects. Given the reality of events, the lawyer-notarization requirement burdens petitioning by causing the utility of a communication to vary with its setting and with the qualifications of the circulator.

It would serve no useful purpose to dwell upon this line of argument. The short of it is that a state cannot separate petitioning into two steps, close off the second step to all but a tiny professional class, and then ignore the effects of that restriction. See Buckley, 525 U.S. at 194-95 (invalidating a registration requirement that unduly "limits the number of voices who will convey [the proponent's] message" (quoting Meyer v. Grant, 486 U.S. 414, 422-23, 100 L. Ed. 2d 425, 108 S. Ct. 1886 (1988)); Lerman v. Bd. of Elections in the City of N.Y., 232 F.3d 135, 146 (2d Cir. 2000) (invalidating a residency requirement for petition verifiers because it drastically reduced the number of potential circulators); Krislov v. Rednour, 226 F.3d 851, 860 (7th Cir. 2000)

(invalidating a requirement that a circulator/certifier be registered to vote in particular political subdivisions because it "precludes the candidate from utilizing a large class of potential solicitors to convey his message"). Accordingly, the attempted distinction fails.

The appellants' third avenue relies upon a "causation" argument which, if credited, would make it unnecessary for us to reach the question of severity. Under this rubric, they note that Perez collected a total of fewer than 80 signatures (only 19 of which were actually presented to the Commission). Based on this "meager" effort, they fault the district court for failing to address the issue of whether Perez had made a diligent effort to obtain the requisite number of petitions. In their view, the absence of due diligence should bar any claim that the lawyer- notarization requirement "caused" Perez's inability to register the Party.

The appellants derive this due diligence condition from a misreading of Storer. In that case, the Supreme Court remanded for further factfinding as to whether, "in the context of California politics . . . a reasonably diligent independent candidate [could] be expected to satisfy the signature requirements" imposed by a state statute regulating the filing of nomination papers by independent candidates. 415 U.S. at 742. Contrary to the appellants' importunings, this language did not portend that only those who demonstrate due diligence can mount a First Amendment challenge to a ballot access requirement. The Storer remand went to the burdensomeness of the challenged regulation (i.e., its severity), not to causation. While a particular plaintiff's "past experience" can have evidentiary significance in an assessment of severity, id., a showing of personal

due diligence is not an element of a ballot access claim, see, e.g., Norman, 502 U.S. at 293 (holding that a state may not "require petitioners to gather twice as many signatures to field candidates in [a multidistrict subdivision] as they would need statewide" without inquiring whether petitioners had shown due diligence in trying to satisfy the challenged requirement); Anderson, 460 U.S. at 802-04 (discussing challenge without asking whether the petitioner had shown due diligence in attempting to meet Ohio's early filing deadline). Indeed, a rule such as that espoused by the appellants would tend to inoculate even the most blatantly unconstitutional electoral requirements from legitimate attack. n9

That ends this phase of our analysis. We conclude, without serious question, that Puerto Rico's lawyer-notarization requirement imposes a severe burden on Perez's rights.

We turn next to the task of "identifying and evaluating the precise interests put forward by the State as justifications for the burden imposed by its rule." Anderson, 460 U.S. at 789. In the course of that inquiry, we must determine the legitimacy and strength of each of those interests as well as the extent to which they dictate burdening citizens' rights. Id.

We do not gainsay Puerto Rico's robust interest in protecting the integrity of its election processes. See Timmons, 520 U.S. at 364; Am. Party of Tex., 415 U.S. at 782 n.14. This includes an "important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot."

Jenness, 403 U.S. at 442. That interest is directly served by the five percent petitioning requirement. See Lubin v. Panish, 415 U.S. 709, 718, 39 L. Ed. 2d 702, 94 S. Ct. 1315 (1974) (terming a signature requirement the "obvious" means of testing a candidate's level of support). The conundrum here involves an additional safeguard -- the lawyer-notarization requirement -- and the interests it advances.

The appellants have identified only one such interest: preventing election fraud. They assert that notarization is necessary to "remedy a type of electoral fraud that the Puerto Rico Legislature found to have been pervasive." Appellants' Reply Br. at 39. The Puerto Rico Supreme Court echoed this sentiment. It declared that notarization "serves a compelling state interest in guaranteeing the integrity of the electoral process, given the history of electoral fraud and corruption experienced in Puerto Rico." CAP I, Off. Trans. at 15. In this regard, the court singled out "the popular practice of manipulating the voting lists." Id.

Even though we accept the legitimacy of this interest, we must nonetheless mull the extent to which that interest renders it necessary to burden Perez's rights so severely. See Anderson, 460 U.S. at 789. The question of whether the lawyer-notarization requirement is narrowly fashioned to advance the identified state interest boils down to whether notarization by a lawyer is more likely to reduce fraud by any or all of the participants in the transaction than other available (less restrictive) alternatives. We examine this question from a variety of perspectives.

As to the voter, the appellants contend that notarization gives some meaningful assurance that voters' signatures are authentic. "The [voter] takes oath to that fact and experience has shown that many people take their oaths seriously." Libertarian Party of Va. v. Davis, 591 F. Supp. 1561, 1564 (E.D. Va. 1984), aff'd, 766 F.2d 865 (4th Cir. 1985). But this contention is disingenuous, for it is the oath that guarantees honesty -- not the pedigree of the oath-giver. The appellants do not suggest that people take oaths less seriously in jurisdictions where notaries need not be lawyers or in jurisdictions where affirmations are taken by non-notary witnesses. The idea that notarization by a lawyer will significantly reduce voter fraud is utterly unsupported by the record; there is nothing to show that a voter bent on committing petition fraud will be less brazen in front of a lawyer- notary than in front of some other type of witness. n10

We turn next to petition circulators. The appellants offer no developed argumentation to the effect that notarization by a lawyer will discourage circulator fraud. We assume that this is a concession. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (holding that points raised on appeal in a perfunctory fashion, without developed argumentation, are conceded). In any event, the district court effectively scotched any such notion, observing that "[a] lawyer will notarize a signature merely by verifying the signatory's identification," and that "there is no reason to believe that attorneys who happen to be notaries are somehow more adept than non-lawyers at reading and verifying" identification documents. Perez Guzman, 260 F. Supp. 2d at 393.

This leaves the notary himself. The Puerto Rico Supreme Court suggested that the lawyer-notarization requirement "allows for the imposition of sanctions for any illegal act committed by the person before whom the petition is sworn to." CAP I, Off. Trans. at 14 (citations and internal quotation marks omitted). But this rationale does not itself distinguish the lawyer-notary from any other person who may be authorized by the Commission to verify petitions. One need be neither a lawyer nor a notary to be fined or imprisoned for participating in the preparation of fraudulent documents. See, e.g., P.R. Laws Ann. tit. 33, § 4437 (2001). n11

We recognize that "notarial practice is strictly regulated" in Puerto Rico; that notaries are "the only officers vested by the [Puerto Rico] Supreme Court with the authority to guarantee . . . the authenticity of the documents executed before them"; and that "the intervention of a notary establishes a presumption of veracity in all the documents authenticated by him or her." CAP I, Off. Trans. at 15 (citation omitted). But without some proof that lawyer-notarization is appreciably more effective at preventing petition fraud than non-lawyer verification -- and the record contains none -- all of this is beside the point. The fact that a state's asserted interest in preventing electoral fraud is important in the abstract does not create a presumption that its chosen means of regulation will advance that interest. See Lerman, 232 F.3d at 149.

In a related vein, the appellants contend that the lawyer-notarization requirement is necessary because a successful petition effort stands to reap a munificent harvest for the Party -- at least $ 600,000 from the

Electoral Fund in an election year, $ 300,000 in a non-election year, and "insider" status for the next four years. See CAP I, Off. Trans. at 9 (noting that "registered parties . . . share in the Electoral Fund"); CAP II, Off. Trans. at 9 (explaining that registration also allows a party to "become a part of the government body that governs the electoral process, as a result of which it acquires quasi-public functions"). These facts simply reinforce a proposition to which we already have subscribed, namely, that the state has a compelling interest in preventing the fraudulent registration of political parties. Access to special privileges says nothing about the effectiveness of lawyer-notarization as a means of advancing that interest.

In considering whether a ballot access requirement is narrowly drawn to advance the state's interest in preventing fraud, the mechanisms that the state already has in place serve as benchmarks. Norman, 502 U.S. at 294. We think it noteworthy, therefore, that the Commission routinely allows the use of ad hoc notaries for a wide variety of analogous purposes, e.g., "for a person registering to vote, a voter changing his electoral address, petitioners seeking to have an independent candidate placed on the ballot, and petitions nominating candidates for primaries." Perez Guzman, 260 F. Supp. 2d at 391. n12 In addition, ad hoc notaries were authorized for use in the 1998 commonwealth-wide status plebiscite. See CAP I, Off. Trans. at 9. The record contains not one hint of election fraud or administrative error committed by, or under the auspices of, ad hoc notaries. Absent some evidence that the use of ad hoc notaries correlates with a higher incidence of corruption or unreliability, we cannot accept the Commission's ipse dixit that it needs to insist

on the use of lawyer-notaries in the new-party petition context. See Werme, 84 F.3d at 485 (explaining that "mere suspicion or paranoia is too flimsy a foundation on which to rest a claim of incipient fraud or mistake").

Referring back to a political party's access to the Electoral Fund and its opportunity to participate as an "insider" in the electoral system for a four-year period, the appellants posit that registration as a political party entails higher stakes than other matters (and, hence, that the use of ad hoc notaries in that context would be especially risky). By this logic, parties by petition are not situated similarly to independent candidates, candidates for major party primaries, or even groups participating in the plebiscite process. We think that this vastly overstates the matter; it is not obvious to us that, say, the status plebiscite was less important to the future of Puerto Rico than the registration of a new political party. We need not pursue this point, however, because the appellants have not shown that, compared with verification by ad hoc notaries, lawyer-notarization is superior in detecting and deterring petition fraud.

We add, moreover, that the use of ad hoc notaries is not the only feasible safeguard available to the Commission (indeed, the record strongly suggests that notarization may not even be the best means currently employed by the Commission). The Commission checks every petition to ensure that the signature is valid. Perez Guzman, 260 F. Supp. 2d at 390. It is in the process of computerizing its voter registration records to include each registered voter's signature. This project is slated for completion later this year, and its completion will enhance the Commission's ability to verify petitions. To

accomplish these tasks, the Commission has at its disposal a cadre of people not affiliated with any political party. These nonpartisan workers comprise the so-called Validations Unit, a unit that has the assignment of checking petitions one by one against the Commission's records. The Secretary of the Commission, in answer to a query from the district court, testified that "it would not be difficult for the Commission to check [new-party] petitions . . . against [its] records." n13

In this specialized electoral context, the Commission's in-house verification procedure compares favorably with lawyer- notarization. As the district court found, a lawyer-notary usually verifies a signature by checking a driver's license, a passport, or some other identification document. Perez Guzman, 260 F. Supp. 2d at 391. There is no indication that notaries compare signatures to those appearing on voting records or take steps to ensure that affiants are registered voters. The Commission, it appears, is better positioned than a notary to detect the species of fraud that purportedly justifies the lawyer-notarization requirement. See CAP I, Off. Trans. at 15 (offering as a justification the need to ferret out the "popular practice of manipulating the voting lists").

Let us be perfectly clear. A state is entitled to take a "belt-and-suspenders" approach and put in place multiple mechanisms for ensuring the integrity of its electoral processes. Here, however, the record fails to show that lawyer-notarization adds anything over and above other readily available means of verification. Based in part on the absence of evidence that lawyer-notarization reduces electoral fraud and in part on the

array of less restrictive alternatives available to the state (including the feasibility of using non-lawyers as ad hoc notaries and the Commission's apparent ability to verify every petition in- house), we find the lawyer-notarization requirement broader than necessary to serve the state's asserted interest. Consequently, the requirement embodied in section 3101(3) cannot survive a First Amendment challenge. See Norman, 502 U.S. at 293-94; Krislov, 226 F.3d at 866; Cruz, 204 F.3d at 22.

IV. CONCLUSION

We need go no further. For the foregoing reasons, we hold (1) that res judicata does not bar the maintenance of the instant action, and (2) that the lawyer-notarization requirement is not narrowly drawn to advance a compelling state interest (and, thus, cannot withstand First Amendment scrutiny). We are mindful that our constitutional conclusion differs from that of the Puerto Rico Supreme Court, and we do not lightly part company with so distinguished a tribunal. But it is our responsibility to interpret and apply the Constitution of the United States, and it would be a dereliction of that duty to defer to the views of any state court.

The judgment of the district court is affirmed and the stay previously issued is dissolved.

FOOTNOTES

* Of the Third Circuit, sitting by designation.

n1 Puerto Rico is the functional equivalent of a state for First Amendment purposes, see Posadas de P.R.

Assocs. v. Tourism Co., 478 U.S. 328, 331 n.1, 92 L. Ed. 2d 266, 106 S. Ct. 2968 (1986) (noting that Puerto Rico is fully subject to the First Amendment), and we sometimes refer to Puerto Rico as if it were a state notwithstanding its unique commonwealth status.

n2 In this regard, we note that Perez's complaint emphasizes his personal right to circulate and verify party petitions. By contrast, the Party's complaint focused upon "associational, speech, and voting rights under the ballot access doctrine." CAP I, Off. Trans. at 2. The two theories do not perfectly coincide, and their divergence serves as a reminder that there may be subtle conflicts of interest between an association and its individual members. It is for precisely such reasons that the commentators urge "great care . . . before binding all members to an association loss." 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4456, at 507-10 (2002).

n3 The record is unclear about when Perez himself joined the Party. If the district court is correct that the appellants failed to prove his membership in the Party during the key phases of the original litigation, it is hard to see how he could be bound by the earlier adjudication. Cf. Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 974-75 (1st Cir. 1989) (holding that since "the [plaintiff] firm had not been formed when the [prior] judgment eventuated," there was "no predicate for a founded claim that [plaintiff] was a party in interest or a controlling force in the [prior] litigation"). We need not test that finding, however, for even if Perez's membership dates back to a time when the original litigation was velivolant, the result here would be

unaffected. Mere membership in a political party, in and of itself, is not enough to demonstrate control over the party's affairs.

n4 The other cases cited by the appellants are so plainly distinguishable as not to warrant discussion. See, e.g., In re Colonial Mortg. Bankers Corp., 324 F.3d 12 (1st Cir. 2003); Doe v. Urohealth Sys., Inc., 216 F.3d 157 (1st Cir. 2000); Studio Art Theatre v. City of Evansville, 76 F.3d 128 (7th Cir. 1996). The discussion in Snyder v. Munro, 106 Wn.2d 380, 721 P.2d 962 (Wash. 1986), is dictum and, in all events, unhelpful.

n5 What we have written to this point fully disposes of the appellants' reliance on the so-called Rooker-Feldman doctrine. See Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16, 68 L. Ed. 362, 44 S. Ct. 149 (1923). After all, "only a state court adjudication that itself has preclusive effect can bring the Rooker-Feldman doctrine into play." Cruz, 204 F.3d at 21 n.5.

n6 We see no principled basis for distinguishing party-petition signature gatherers from the initiative-petition circulators in Buckley. The common denominator is that "both seek ballot access." 525 U.S. at 191.

n7 To be sure, the Commonwealth pays notaries a dollar for each notarized petition that the Commission accepts as valid, P.R. Laws Ann. tit. 16, § 3101(3), and "sworn statements given on electoral matters," including registration petitions, are exempt from the usual tax, id. § 3028; Regulation for the Registration of Parties by Petition, § 3.2 (Jan. 23, 2002). The fact of the

matter, however, is that these mild palliatives do not come close to offsetting the high cost of notarization.

n8 The appellants hypothesize that notaries may be willing to verify petitions en masse at a flat fee, thus reducing overall costs. The only evidentiary support for this hypothesis is the testimony of a single attorney who acknowledged that he might be willing to notarize up to 500 signatures per month -- in his office -- for $ 1,000 per month. See Perez Guzman, 260 F. Supp. 2d at 392 n.23. But the suggestion was ringed with conditions, and the prospect of a political proselytizer rounding up squads of voters and persuading them to troop to a law office seems remote. At any rate, the district court found that the cost of such an arrangement would still be prohibitive and discounted its feasibility. See id. The record offers no basis for setting aside these findings.

In much the same vein, it is not a satisfactory answer to say that Perez can recruit notaries who will volunteer their services. His experience has been to the contrary, and the record contains no evidence that attorneys routinely work for free or that fledgling parties can consistently attract lawyers to their cause.

n9 We recognize that the Puerto Rico Supreme Court gave the Party "an opportunity to show the steps it had taken with regard to its registration process." CAP II, Off. Trans. at 2. In its own statement of the ballot access doctrine, however, the court recognized that the test of burdensomeness was "whether it would be possible for a reasonably diligent candidate to satisfy the State's requirements," not whether the Party had been reasonably diligent. CAP I, Off. Trans. at 12. To

the extent that the Puerto Rico Supreme Court would treat due diligence as a prerequisite for stating a ballot access claim, we respectfully disagree.

n10 The appellants have not argued that the formal incidents of notarization, such as the application of the notarial seal or the special status that notaries may enjoy under Puerto Rico law, carry special weight with voters or otherwise influence voters' decisions about whether to obey the law.

n11 We are aware that the Puerto Rico Supreme Court stated that "penal statutes enacted to prevent electoral fraud have proved ineffective." CAP I, Off. Trans. at 16 n.11 (citing P.S.P. v. Romero Barcelo, 10 P.R. Offic. Trans. 315, 110 D.P.R. 248 [10 P.R. Off. Trans. 315] (1980)). However, the very decision the court cites upheld a contested provision in part because "the mechanisms provided by law to avoid fraud in the coming election" were sufficient to allay fears that the election might be vitiated by fraudulent votes. 10 P.R. Off. Trans. at 329-30.

n12 According to the Secretary of the Commission, candidates or groups that wish to use ad hoc notaries must give the Commission a list of functionaries who are willing to act in that capacity. These functionaries need not be lawyers; any bona fide voter may so serve. The Commission then appoints ad hoc notaries from these lists.

n13 This may represent a changed circumstance. During the currency of the Party's case, the commonwealth courts found that the Commission "did not have enough officers to examine the legitimacy of

the new parties' endorsement collection process." CAP I, Off. Trans. at 15.

Civil No. 01-2132 (HL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

JOSE EMILIO PEREZ GUZMAN,
Plaintiff,

v.

AURELIO GRACIA, et al,
Defendants.

March 10, 2003, Decided
March 10, 2003, Received & Filed

COUNSEL: For JOSE EMILIO PEREZ-GUZMAN, plaintiff: Nelson Rosario, San Juan, PR.

For JUAN R. MELECIO, defendant: Ramon L. Walker-Merino, San Juan, PR.

JUDGES: HECTOR M. LAFFITTE, Chief U.S. District Judge.

OPINIONBY: HECTOR M. LAFFITTE

OPINION:

OPINION AND ORDER

Before the Court is a claim by Plaintiff Juan Emilio Perez Guzman ("Perez") seeking declaratory and injunctive relief to declare 16 L.P.R.A. § 3101(3) in violation of the Constitution. This section defines the

procedure by which a new political party may register to appear on the general election ballot. Perez claims that the requirement that the petitions to register a party must be notarized by an attorney violates his First Amendment and equal protection rights. Defendants are the members of the Puerto Rico State Elections Commission ("SEC"). The Commonwealth of Puerto Rico has also intervened in this case in defense of the statute. n1 On January 13, 2003, the Court held a hearing on the merits of Perez's claim. The parties have submitted post-trial briefs, and the Court is ready to rule.

1. Findings of fact

1. In Puerto Rico's 2000 gubernatorial elections, approximately 2,000,000 citizens voted. n2

2. When an organization submits petitions to the SEC to have a new political party registered, SEC personnel check each petition to ensure that the signatures are valid. Although the SEC does not have personnel at present dedicated solely to this function, the agency can, and does, hire employees as this need arises. n3

3. The SEC is currently in the process of digitally recording all its records of registered voters. The project is expected to be finished by the end of 2003. Once completed, this new computerized record-keeping system will facilitate the agency's ability to check petitions that are submitted to it. n4

4. In Puerto Rico, only attorneys may serve as notaries. n5 They are strictly regulated by the Puerto Rico Notary Law. n6

5. A lawyer-notary certifies that a person signing a document is who the signatory claims to be in one of two ways: (1) by checking the signatory's driver license, passport, or other identification or (2) by certifying that she personally knows the signatory. n7

6. In certain classes of electoral petitions and forms, the SEC allows "ad hoc notaries" to certify the validity of signatures. Ad hoc notaries are individuals registered to vote in Puerto Rico who have been authorized by the SEC to verify signatures. These individuals do not necessarily have to be lawyers. n8

7. The SEC allows ad hoc notaries to be used for a person registering to vote, a voter changing his electoral address, petitioners seeking to have an independent candidate placed on the ballot, and petitions nominating candidates for primaries all require only an ad hoc notary. n9 Additionally, in the status plebiscite held in 1998, the "PRO ELA" organization qualified for campaign funds based on petitions that it had submitted to the SEC which were notarized by ad hoc notaries. n10

8. In Puerto Rico, the fair market price for a lawyer to notarize a simple document signed at the lawyer's office is between fifteen and twenty dollars. If the document is complicated or requires the attorney to prepare it, or if the lawyer has to travel to the place where the signing will take place, the fee can go up to as much as fifty or sixty dollars. n11

9. The five lawyer-notaries who testified all stated that they would be unwilling to notarize documents at the rate of one dollar per signature. n12

10. There are approximately 13,000 lawyers in Puerto Rico. Of this number, approximately 8,000 are notaries. n13

11. Perez has attempted to convince voters to sign petitions to register the Civil Action Party. However, the petitions must be notarized by a lawyer, and he has been unable to obtain the requisite number of petitions. n14

2. Legal analysis

To register a new political party in Puerto Rico, the fledgling organization must submit to the SEC petitions signed by registered voters in a number aggregating at least five percent of the total votes cast for gubernatorial candidates in the preceding election. n15 Thus, individuals attempting to register a new party would have to obtain approximately one hundred thousand signatures. Each signature must be notarized by an attorney, who is entitled under the law to receive a fee from the SEC of only one dollar per notarized signature. n16

Perez claims that this regime violates the Constitution. Citizens have the constitutional right to foster and develop new political parties. This right is derived from the First and Fourteenth Amendments. n17 It is a right to associate and to form political organizations which advance common goals and ideals. n18 A regulation or statute which imposes a severe burden on this right "must be narrowly tailored and advance a compelling state interest." n19 A court should view severe restrictions to ballot party access "skeptically, affording exacting scrutiny to such restrictions." n20 If a plaintiff

challenging such a statute can show that he is severely restricted by it, the state then must establish a corresponding interest which is sufficiently significant to justify the limitation. n21 That is, the state must come forward with some proof to justify the reason for the challenged restriction. n22

In the present case, in order to register a new political party, Perez will need approximately one hundred thousand signatures notarized by attorneys. He has shown that in Puerto Rico attorneys charge, at a minimum, fifteen dollars to notarize a signature and that attorneys are unwilling to notarize signatures at the rate of one dollar set forth in section 3101(3). Thus, one hundred thousand signatures at a cost of fifteen dollars per notarization would come to 1,500,000 dollars. This strikes the Court as an unreasonably high price tag for an individual who is seeking to exercise his constitutional rights. n23

It is clear that Perez faces a sizeable financial obstacle in his quest to register a new political party. It is thus beholden upon Defendants to show that the requirement that petitions be notarized by an attorney is narrowly tailored and advances a compelling government interest. n24 Here, Defendants fail to meet their burden. In fact, they made little attempt to justify or explain why a new political party requires notarizations done by a lawyer-notary. Their lone witness testified only that there are other situations where the SEC does require that a signature be notarized by a lawyer. In the situations cited by this witness, however, the applicant only had to submit one notarized signature. The Court belabors the obvious in noting that a requirement of obtaining a single

notarization from a lawyer is significantly less burdensome than a requirement of one hundred thousand notarizations.

The Court can conceive of no reason -- and Defendants have proffered none -- why lawyer-notaries are necessary for the registration of new political parties. In other instances, the SEC relies on the services of ad hoc notaries. Presumably, they fulfill their duties adequately in those situations. Ad hoc notaries were allowed for the petitions of the 1998 status plebiscite. If the SEC relies on ad hoc notaries for elections dealing with topics as important as the status of Puerto Rico, it is reasonable to assume that they would also be competent enough for the registration of new political parties. It is thus unclear why lawyers are required in the particular circumstances of the present case. A lawyer will notarize a signature merely by verifying the signatory's identification. This is not a complex task that requires special training or skill. There is no reason to believe that attorneys who happen to be notaries are somehow more adept than non-lawyers at reading and verifying an individual's drivers license or passport.

The Court recognizes that Puerto Rico has a legitimate interest in ensuring the integrity of its electoral process. It is also legitimate to require that registered political parties demonstrate a minimum level of support. n25 However, there is no indication in the record that lawyer-notaries are somehow better than ad hoc notaries at advancing these interests. Moreover, there are already other safeguards in Puerto Rico's electoral regime which do protect these concerns. First, anyone seeking to register a political party must

convince approximately one hundred thousand voters to sign off on this cause. This is not an insignificant number. Second, these one hundred thousand signatures will be checked by SEC personnel. Third, even if a party were able to overcome these two hurdles through some improper subterfuge, the party still must face the ultimate arbiter: the electorate. In order to remain registered, a political party must receive a specified minimum percentage of the votes cast in the last general election. n26 A party that fails to meet this minimum will then have to register by petition once again and will lose government funding. n27

All of these mechanisms serve to protect legitimate concerns regarding the regulation of elections. There is nothing before the Court to demonstrate that the use of lawyer-notaries protects these concerns any better than ad hoc notaries would. Lawyer-notaries charge fifteen dollars per signature; ad hoc notaries charge nothing. Thus, section 3101(3), which ostensibly is intended to protect an individual's right of free association, has instead less salutary consequences: it imposes a daunting financial burden on fledgling parties and cocoons the already existing political parties from competition. Defendants have not met their burden of showing that the lawyer-notary requirement is narrowly tailored and advances a compelling state interest. The record demonstrates that there is available a much-less burdensome means of verifying signatures. Accordingly, the Court holds that the requirement in section 3101(3) that petitions for new political parties be notarized by a lawyer is unconstitutional and in violation of Perez's First

Amendment rights. n28 Judgment shall be entered accordingly. n29

IT IS SO ORDERED.

San Juan, Puerto Rico, March 10, 2003.

HECTOR M. LAFFITTE
Chief U.S. District Judge

JUDGMENT

Pursuant to the opinion and order issued by the Court on this same date, judgment is hereby entered declaring the requirement in 16 L.P.R.A. § 3101(3) that petitions for new political parties be notarized by a lawyer to be in violation of the First Amendment of the Constitution.

San Juan, Puerto Rico, March 10, 2003.

HECTOR M. LAFFITTE
Chief U.S. District Judge

FOOTNOTES

n1 Docket nos. 34 & 37.

n2 At the hearing, an SEC official estimated this number at 1,800,000. Testimony of Ramon Jimenez-Fuentes. The SEC's own web site indicates that this figure was slightly above 2,000,000. See http://www.ceepur.net/elecciones2000/escrutinio/summary.html. The Court takes judicial notice of this figure. Fed. R. Evid. 201.

n3 Testimony of Ramon Jimenez-Fuentes.

n4 Id.

n5 4 P.R. LAWS ANN. § 2011 (1994); RB Town & Country Realty, Inc. v. TLC Beatrice Int'l Holdings, 966 F. Supp. 131, 132 (D.P.R. 1997).

n6 4 P.R. LAWS ANN. § § 2001 - 2141. A lawyer-notary's failure to comply with his duties can result in the imposition of stiff sanctions. See, e.g., In re Gonzalez Gonzalez, 19 P.R. Offic. Trans. 536, 119 P.R.Dec. 496, 499-500 (1987).

n7 Testimony of Daniel Zambrana.

n8 Testimony of Ramon Jimenez-Fuentes.
n9 Docket no. 42, at 10-11.

n10 Id. at 11.

n11 Testimony of Daniel Zambrana-Santiago, Miguel Sarriera-Roman, Wilma Rosario-Rodriguez, Jesus Rivera-Delgado, and Alberto Acevedo-Colon.

n12 Id.

n13 Testimony of Miguel Sarriera-Roman.

n14 Testimony of Jose Emilio Perez Guzman.

n15 16 P.R. LAWS ANN. § 3101(3) (Supp. 1998).

n16 Id.

n17 Norman v. Reed, 502 U.S. 279, 288, 112 S. Ct. 698, 705, 116 L. Ed. 2d 711 (1992).

n18 Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357, 117 S. Ct. 1364, 1369, 137 L. Ed. 2d 589 (1997).

n19 Id. at 358, 117 S. Ct. at 1370; see also Norman, 502 U.S. at 289, 112 S. Ct. at 705.

n20 Cruz v. Melecio, 204 F.3d 14, 22 (1st Cir. 2000).

n21 Norman, 502 U.S. at 288-89, 112 S. Ct. at 705.

n22 Cruz, 204 F.3d at 22.

n23 At the hearing Defendants elicited from one of the testifying attorneys an acknowledgment that he might be willing to notarize signatures en masse for a flat fee of one thousand dollars per month. However, that attorney also stated that he would initially agree to such an arrangement on a trial basis only; that he would do it only if he could continue to handle his other legal work; that the signatories would have to go to his office; and that he would work only one hour per day on this project. He assumed that he would be notarizing up to 500 signatures per month. See Testimony of Miguel Sarriera-Roman.

Even assuming that these conditions could be met, the Court finds that this arrangement would provide little succor to someone attempting to register a new political party. The cost of this procedure would still be significant. This arrangement comes to two dollars per signature. One hundred thousand notarizations would thus cost 200,000 dollars. Additionally, at a rate of 500

signatures a month, it would take over sixteen years to obtain the requisite number of signatures. If other attorneys could be convinced to enter into this agreement, the time would of course be less. However, even if a sizeable cadre of attorneys could be recruited to this cause, anyone attempting to convince voters to sign petitions would also have to convince these voters to go to the selected attorney's office at a specific time to sign a petition. These logistical factors create additional obstacles to the registration of a new political party. They are unnecessary when there is a ready, less obtrusive, alternative which the SEC has used in other facets of its regulatory scheme: an ad hoc notary who goes to the potential signatory.

n24 Timmons, 520 U.S. at 358, 117 S. Ct. at 1370; Norman, 502 U.S. at 289, 112 S. Ct. at 705.

n25 Jenness v. Fortson, 403 U.S. 431, 442, 91 S. Ct. 1970, 1976, 29 L. Ed. 2d 554 (1971); Maine Green Party v. Maine Secretary of State, 173 F.3d 1, 3 (1st Cir. 1999); Libretarian Party of Maine v. Diamond, 992 F.2d 365, 371 (1st Cir. 1993).

n26 16 P.R. LAWS ANN. § 3101(1). A party must receive in the previous general election at least (1) five percent of all the votes cast for governor, (2) seven percent of all the votes cast, or (3) three percent of the total number of straight ticket ballots cast for Governor and Resident Commissioner.

n27 16 P.R. LAWS ANN. § § 3115 & 3116.

n28 Because the Court finds section 3101(3) to be in violation of the First Amendment, it is unnecessary to

consider whether it also violates Perez's equal protection rights.

n29 The Court notes that the First Circuit in Cruz observed that section 3101(3) appeared to suffer from constitutional defects. However, the procedural posture of the appeal precluded the First Circuit from entering into a review of the constitutionality of the statute. 204 F.3d at 22.

Nos. 03-1621, 03-1622

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOSE EMILIO PEREZ-GUZMAN
Plaintiff - Appellee

v.

AURELIO GRACIA; CARLOS LOPEZ-ELICIANO; PEDRO FIGUEROA; DAMARIS MANGUAL,
individually and in their official capacity as members of the Commonwealth Elections Commission
Defendants

THE COMMONWEALTH OF PUERTO RICO
Defendant – Appellant

November 12, 2003

Before,

Boudin, Chief Judge,

Torruella, Selya, Stapleton, Lynch Lipez and Howard, Circuit Judges.

Order of the Court

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc,

it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By The Court:
Richard Cushing Donovan, Clerk.

[CC: Nelson Rosario Rodriguez, Esq., Ramon L. Walker Merino, Esq., Rene Arrillaga Belendez, Gerardo De Jesus Annoni]

16 L.P.R.A. § 3101(3)

The parties

(3) Party by Petition. Shall be any group of citizens who, desiring to appear on the electoral ballot of a general election, shall register as a political party, on or before June 1 of the election year, by filing with the Commission sworn petitions to such effect, before notary publics duly admitted to the practice of notary, pursuant to the provisions of the Notary Act in effect, who shall collect from the Electoral Commission a fee of one (1) dollar for each valid, notarized petition signed by a number of electors of no less than five (5) percent of the total votes cast for all candidates for the office of Governor in the preceding general election. A government program or political platform, as well as the names and addresses of the group of electors that constitute its central directing body, must also be presented.

The party shall become registered upon acceptance of said sworn petitions, and from that time on may present a complete slate in all the precincts in accordance with the procedures provided in this chapter.